No. 12741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

vs.

WALTER W. GRAMER,
Claimant of 213 Bottles, etc.
Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

I

STATEMENT OF JURISDICTION

Under 21 U.S.C. 334(a), the District Court had jurisdiction over the libel for condemnation proceedings involved in this appeal.

Pursuant to 28 U.S.C. 1291, this Court has jurisdiction to review the decision of the District Court.

II

STATEMENT OF THE FACTS

This appeal involves two libel for condemnation proceedings that were instituted in the District Court of the United States for the Western District of Washington under the Federal Food, Drug, and Cosmetic Act. [21 U.S.C. 334(a)]. By order of that Court, the cases were consolidated since the articles proceeded against and the substantive charges are the same in both cases. (R. 18)

The Libels charge that the drug in question, Sulgly-Minol, is misbranded in violation of 21 U.S.C. 352(a) because its labeling suggests it is effective as a treatment for rheumatism, arthritic conditions, boils, and acne, whereas the drug is not effective for those purposes. (R. 4, 11).

In the Answers filed by the claimant-appellee, Walter W. Gramer, the substantive allegations of the Libels are denied, and the affirmative defense is raised that Mr. Gramer was acquitted in a prior criminal proceeding in the District Court of the United States for the District of Minnesota which involved the same product and the same charges of misbranding. (R. 7, 8, 14, 15).

The Government filed a Motion to Strike this

affirmative defense on the ground that a judgment of dismissal in a criminal case, where the burden of proof is "beyond a reasonable doubt", cannot be *res judicata* in the instant consolidated action, where the burden of proof is "by a preponderance of the evidence." (R. 19). This motion was denied by the District Court. (R. 20).

Thereafter, the parties entered into a Stipulation which sets forth (1) the composition of Sulgly-Minol, (2) the criminal information and the judgment of acquittal in the District of Minnesota, and (3) the leaflets which are a part of the labeling of the drug and which contain the representations of benefit to be derived from its use. (R 21-35). The Stipulation also declares that the drug and labeling under seizure here are in all material respects the same as the drug and labeling which were involved in the criminal prosecution in the District of Minnesota.

Subsequently, the claimant filed a Motion for Summary Judgment. (R. 35-6). This Motion was granted and the case ordered dismissed by the lower court on the ground that the claimant's acquittal in the prior criminal proceeding constitutes a complete legal defense in the instant cause. (R. 38-9).

III

STATUTORY PROVISIONS INVOLVED

Federal Food, Drug, and Cosmetic Act

"Section 502. *Misbranded drugs and devices* (21 U.S.C. 352)

A drug shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular."

"Section 301. *Prohibited acts* (21 U.S.C. 331)

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"Section 303. *Penalties — Violation of section 331* (21 U.S.C. 333)

(a) Any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; . . ."

"Section 302. *Injunction proceedings — Jurisdiction of courts* (21 U.S.C. 332)

(a) The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, . . . to restrain violations of Section 301 . . ."

"Section 304. *Seizure — Grounds and jurisdiction* (21 U.S.C. 334)

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce . . . shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found; . . . "

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and

charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold:

PROVIDED, That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under Section 404 or 505, be

introduced into interstate commerce, shall be disposed of by destruction."

IV

QUESTIONS INVOLVED

(1) Does an acquittal in a *criminal* proceeding under the Federal Food, Drug, and Cosmetic Act stand as a bar to a subsequent *libel for condemnation* suit under the same Act, where the parties, the drug, and the issues of misbranding are the same?

(2) Did the District Court err in denying the Government's Motion to Strike the Affirmative Defense?

(3) Did the District Court err in granting the Claimant's Motion for Summary Judgment?

V

SUMMARY OF ARGUMENT

A. *Introduction*

Appellee Gramer distributes a proprietary drug "Sulgly-Minol" which he represents as effective in the treatment, cure, and prevention of rheumatism, arthritis, boils, and acne. Through his literature, he offers relief from these conditions by rubbing Sulgly-Minol on the soles of both feet, before going to bed.

The Government charges this drug is misbranded because it has no such therapeutic value. Under the pleadings, these allegations must be accepted as true.

Mr. Gramer has twice been prosecuted in the District of Minnesota under the Federal Food, Drug, and Cosmetic Act for making interstate shipments of Sulgly-Minol similarly alleged to be misbranded. In the first prosecution in 1947, Mr. Gramer pleaded guilty. In the second prosecution, Mr. Gramer was acquitted in 1949 after a trial before the Court.

Three seizure actions of Sulgly-Minol similar to the instant proceedings have resulted in default decrees of condemnation and destruction.

In the instant consolidated seizure action, Mr. Gramer intervened as claimant and pleaded his acquittal in the second prosecution as an adjudication in his favor of all the issues raised in the seizure action.

The Lower Court granted Mr. Gramer's Motion for Summary Judgment on the ground that he has a complete legal defense.

B. *In Criminal Actions Under the Federal Food, Drug, and Cosmetic Act, the Government Must Prove Its Case "Beyond a Reasonable Doubt."*

It is settled that the Government's burden in criminal cases under this Act is to prove every alle-

gation of material fact "beyond a reasonable doubt."

C. *A Seizure Action Under the Federal Food, Drug, and Cosmetic Act is a Civil Suit where the Government's Burden of Proof is "By a Preponderance of the Evidence."*

Seizures cases under the Act are *in rem* proceedings, civil in nature.

In a seizure case, the burden upon the Government is to prove its allegations only "by a preponderance of the evidence," and not "beyond a reasonable doubt."

D. *An Acquittal in a Criminal Case Under the Federal Food, Drug, and Cosmetic Act Does Not Stand as a Bar to a Subsequent Seizure Case under that Act Based Upon the Same Misbranding Charge.*

Mr. Gramer, claimant-appellee, was acquitted in 1949 in a criminal prosecution based upon the same misbranding charge that is made here. However the shipment of Sulgly-Minol in the criminal case was made in 1948, whereas the shipments of Sulgly-Minol in the present case were made in 1949.

The acquittal in the criminal case cannot be invoked as *res judicata* in the instant civil case because of the difference in burden of proof.

The acquittal in the criminal case cannot be invoked as *prior jeopardy* here for two reasons:

(1) the defense of prior jeopardy or double jeopardy may be raised only in a criminal case whereas here we have a civil case, and (2) the shipment of Sulgly-Minol involved in the criminal case is not the same as the shipments of the Sulgly-Minol now under seizure — since each shipment of a misbranded drug constitutes a separate offense, there can be no basis for holding that the present civil suit puts Mr. Gramer in jeopardy again for the same alleged offense for which he was prosecuted in the criminal case.

The Lower Court relied upon *Coffey v. United States*, 116 U.S. 436 (1886) in granting claimant's Motion for Summary Judgment. That case enunciated the rule that the Government could not maintain a civil suit to forfeit property because of an alleged offense against the liquor laws, when the owner of the property had been prosecuted and acquitted in a prior criminal proceeding. The theory of this ruling appears to have been that the forfeiture of property is a punishment, and that a person may not be twice punished for the same offense.

More recent Supreme Court decisions have for practical purposes delimited the scope of the *Coffey* case to the point of extinction.

In *Various Items of Personal Property et al v. United States*, 282 U. S. 577 (1931), the Court held that a prior conviction for defrauding the Government of taxes on distilled spirits did not bar a civil action to forfeit the distillery and other property which the defendants had used in so defrauding the Government. The Court said that forfeiture is not part of the punishment for the criminal offense and that the provision of the Fifth Amendment relating to double jeopardy does not apply.

Helvering v. Mitchell, 303 U. S. 391 (1938), was a civil suit to collect an income tax deficiency and a 50% penalty for fraudulent tax evasion. The defendant had been *acquitted* in a prior criminal proceeding involving the same tax deficiency. The Court held that the acquittal did not bar the Government from collecting the 50% penalty in a *civil* suit since (1) the difference in burden of proof in criminal and civil cases precludes application of *res judicata*, and (2) the double jeopardy clause of the Fifth Amendment may be invoked only in a *criminal* proceeding.

The case at bar is a civil suit to seize and condemn an allegedly misbranded drug. The primary purpose of this suit is to protect the public, not to

punish the shipper of the drug. In fact, the food and drug law contemplates that if a condemned article is susceptible of being brought into compliance with the law, the owner may repossess it on condition that he bring it into compliance with law. This emphasizes the objective of a seizure action to shield the public rather than to penalize the shipper.

VI

ARGUMENT

A. *Introduction*

For some years, Appellee Walter W. Gramer, has been responsible for the interstate distribution of the proprietary drug "Sulgly-Minol" which he represents as efficacious in the treatment, cure, and prevention of rheumatism, arthritis, boils, and acne.

To obtain the remarkable benefits which Sulgly-Minol allegedly affords to those who suffer from these afflictions, it is only necessary to "rub it on the soles of both feet, before going to bed"; relief follows regardless of the situs of the ailment. (R. 28).

It is the consensus of medical opinion available to the Government that Sulgly - Minol is an irrational and worthless treatment for any of these con-

ditions. [1] For this reason, a number of criminal and civil enforcement actions under the Federal Food, Drug, and Cosmetic Act have been directed against Mr. Gramer and his product. In each case, the charge was that the drug was misbranded because of the false and misleading therapeutic claims in its labeling regarding its efficacy in the treatment, prevention, and cure of arthritis, rheumatism, boils, and acne. The criminal cases were instituted under authority of Section 303(a) of the Act. [21 U.S.C. 333 (a)]. The civil or seizure cases were instituted under authority of Section 304(a) of the Act. [21 U.S.C. 334(a)].

The first criminal prosecution, *United States v. Walter W. Gramer* (D. Minn.) was terminated on November 3, 1947, by Mr. Gramer's plea of guilty,

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[1] While this statement of fact is not in the Record through medical testimony, it is the essence of the misbranding charge in the Libels. (R. 4). The Lower Court's Judgment granting the claimant's Motion for Summary Judgment is predicated upon the assumption that the acquittal in a prior criminal case is a complete legal defense even if Sulgly-Minol is irrational and worthless in the treament of these conditions. On the claimant's motion for summary judgment, the Court must accept the allegations of the Libel as true. See *McCombs v. West*, 155 F. (2d) 601, 602 (C.A. 5, 1946); *Furton v. City of Menasha*, 149 F. (2d) 945, 946 (C.A. 7, 1945), cert. den. 326 U.S. 771.

the Court deferring imposition of sentence and placing Mr. Gramer on probation for 30 days. (DDNJ 2281).[2]

Three subsequent seizure actions have resulted in default decrees of condemnation and destruction. *U. S. v. 100 Bottles . . . Sulgly-Minol* (W.D. Wisc., August 9, 1948), DDNJ 2481; *U. S. v. 79 Bottles . . . Sulgly-Minol* (N.D. Texas, June 29, 1950), DDNJ 3154; and *U. S. v. 23 Bottles . . . Sulgly-Minol* (S.D. Calif., June 16, 1950), DDNJ 3155.

A second criminal Information was filed against Walter W. Gramer in the District of Minnesota on November 30, 1948. (R. 23-5). After a trial before the Court, Mr. Gramer was, on April 6, 1949, adjudged not guilty as charged and the Information was dismissed. (R. 26).

Thereafter, the instant seizure actions involving theretofore unlitigated shipments of Sulgly-Minol were brought in the Western District of Washington. In dismissing these actions, the Lower Court assumed

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[2] DDNJ is an abbreviation for Drugs and Devices Notices of Judgment issued by the Federal Security administrator pursuant to 21 U.S.C. 375(a). The Courts take judicial notice of such Notices of Judgment. See *Colgrove v. U. S.*, 176 F. (2d) 614, 615, footnote 1 (C.A. 9, 1949), cert. denied 70 S. Ct. 349 (January 9, 1950); *Libby, McNeill & Libby v. U. S.*, 148 F. (2d) 71, 73, footnote 3 (C.A. 2, 1945).

that the acquittal of Mr. Gramer in the second criminal prosecution was a complete legal defense.

It is our position that (1) the burden of proof in a criminal case under the Federal Food, Drug, and Cosmetic Act is "beyond a reasonable doubt"; (2) the instant consolidated seizure case is a civil proceeding where the burden of proof upon the Government is "by a preponderance of the evidence"; (3) an acquittal in a criminal prosecution under 21 U.S.C. 333(a) is not a bar to a subsequent seizure action under 21 U.S.C. 334(a) involving other shipments of the same article and the same charges of misbranding; and (4) an acquittal in a criminal prosecution under 21 U.S.C. 333(a) is immaterial in a subsequent seizure action under 21 U.S.C. 334(a) involving other shipments of the same article and the same charges of misbranding, and such acquittal is not a valid affirmative defense.

We raise no question in this case as to whether the prior adjudications *against* Walter W. Gramer and *against* Sulgly-Minol could have any effect as *res judicata* in the present proceeding.

We contend that the acquittal upon which the Lower Court relied in granting the claimant's Motion for Summary Judgment merely indicates that in the particular *criminal* case the Court did not feel

that the Government had sustained its burden of proving *every material fact* charged in the Information *beyond a reasonable doubt.*

B. *In Criminal Actions Under the Federal Food, Drug and Cosmetic Act, the Government Must Prove Its Case "Beyond a Reasonable Doubt"*

In criminal prosecutions under this Act (21 U.S.C. 333), the Government has the usual burden of proving every allegation of material fact "beyond a reasonable doubt." This proposition is settled, and is apparently not challenged by the Appellee in this case.

Pasadena Research Laboratories, Inc. v. U. S., 169 F. (2d) 375, 379 (C.A. 9, 1948), cert. den. 335 U.S. 853;

U. S. v. Crescent-Kelvan Co., 164 F. (2d) 582, 588-9 (C.A. 3, 1948).

C. *A Seizure Action under the Federal Food, Drug, and Cosmetic Act Is a Civil Suit where the Government's Burden of Proof is "by a Preponderance of the Evidence."*

Seizure actions under Section 304(a) of the Act [21 U.S.C. 334(a)] are *in rem* proceedings, and it is settled that they are civil in nature.

Alberty Food Products Co. v. U. S., — F. (2d) —— (C.A. 9, Nov. 20, 1950, No. 12,483).

443 Cans of Frozen Egg Product v. U. S., 226 U.S. 172, 183-4 (1912);

U. S. v. 935 Cases of Tomato Puree, 136 F. (2d) 523, 525-526 (C.A. 6, 1943), cert. den. 320 U. S. 778;

U. S. v. 62 Packages . . . Marmola, Prescription Tablets, 48 F. Supp. 878, 884 (W.D. Wisc., 1943), Affirmed 142 F. (2d) 107, 109 (C.A. 7, 1944), cert. den. 323 U.S. 731.

Appellee recognizes that the instant proceedings are civil since his Motion for Summary Judgment expressly relies upon Rule 56 of the Federal Rules of Civil Procedure (R. 35-6), as does the Lower Court's Order Granting Summary Judgment and Dismissal. (R. 38-9).

In seizure proceedings under the Federal Food, Drug, and Cosmetic Act of 1938, the burden of proof upon the Government is the usual one in civil cases —e.g., to prove its allegations only "by a preponderance of the evidence," and not "beyond a reasonable doubt."

U. S. v. 5 Cases . . . Figlia Mia . . . Olive Oil, 179 F. (2d) 519, 524 (C.A. 2, 1950), cert. den. 339 U.S. 963;

U. S. v. 11¼ Dozen Packages . . . Mrs. Moffat's Shoo Fly Powders for Drunkenness, 40 F. Supp. 208, 209 (W.D. N.Y., 1941);

C. C. Co. v. U. S., 147 F. (2d) 820, 824-5 (C.A. 5, 1944).

Some Courts, and they were distinctly in the minority, attempted to create a hybrid burden of

proof for the Government in seizure actions that arose under the predecessor Federal Food and Drugs Act of 1906 — namely, something more than a "preponderance of the evidence" yet something less than "beyond a reasonable doubt." They emerged with the rule that the Government's evidence must be "clear and convincing" or "clear and satisfactory."

> *Van Camp Sea Food Co., Inc. v. U. S.*, 82 F. (2d) 365, 366 (C.A. 3, 1936).

The requisite degree of proof in seizure cases has been frequently considered by the District Courts in the 44 years of enforcement, first of the Federal Food and Drugs Act of 1906 and later of the Federal Food, Drug and Cosmetic Act of 1938. In the usual situation, the Courts' views were embodied in charges to the jury that have not been reported in the Federal Reporter System. Such unreported cases do appear in the volume "Decisions of Courts in Cases Under the Federal Food and Drugs Act" by White and Gates (1934). On pages 1367 and 1368 of the Index under the heading "Burden of Proof", 27 such cases are listed. In the volume "Federal Food, Drug, and Cosmetic Act 1938-1949" by Kleinfeld and Dunn (1949), 6 additional cases are listed in the Index, page 873, under the heading "Burden of Proof."

We submit that there is neither statutory basis

nor compulsion in reason for increasing the burden of proof in seizure actions beyond what normally prevails in civil cases. On the contrary, as recognized in *C. C. Co. v. U. S.*, 147 F. (2d) 820, 824-5 (C.A. 5, 1944), where the Court reversed itself on the Government's petition for rehearing, it is inconsistent with the remedial purposes of this law and the liberal attitude of the Courts in construing it to exact a higher degree of proof than a mere preponderance of the evidence. See also *Research Laboratories, Inc. v. U. S.* 167 F. (2d) 410, 421 (C.A. 9, 1948), cert. den. 335 U. S. 843; *Pasadena Research Laboratories, Inc. v. U. S.*, 169 F. (2d) 375, 379 (C.A. 9, 1948), cert. den. 335 U.S. 853.

In summing up this part of our argument, we submit that seizure actions are civil suits. We further submit that the burden of proof in a *criminal* case under Section 303 of the Act (21 U.S.C. 333) is greater than the burden of proof in a *seizure* action under Section 304 of the Act (21 U.S.C. 334).

D. *An Acquittal in a Criminal Case under the Federal Food, Drug, and Cosmetic Act Does Not Stand as a Bar to a Subsequent Seizure Case under that Act Based Upon the Same Misbranding Charge.*

In denying the Government's Motion to Strike and in granting the Claimant's Motion for Summary

Judgment, the District Court relied upon the case of *Coffey v. United States*, 116 U.S. 436 (1886). It is our position the Court erred in failing to take cognizance that the instant case is distinguishable from the *Coffey* case on the ground that the primary objective here is civil and remedial — not to impose punishment for past acts but to arrest misbranded drugs before they mislead or otherwise do harm to the consuming public. Furthermore, the transactions involved in this case in the Western District of Washington do not grow out of and are not the same transactions with respect to which Gramer was charged and acquitted in the District of Minnesota. It follows that no question of double jeopardy can be involved.

Coffey v. United States, supra, was an *in rem* proceeding against 10 barrels of apple brandy, 1 apple mill, 37 tubs, and 2 copper stills. It was charged by the Government that these articles were subject to forfeiture because they were utilized by Coffey in fraud of certain provisions of the internal revenue laws. Coffey's defense was that he had previously been prosecuted criminally on the same charges, *and acquitted.* In sustaining this defense, the Supreme Court stated (pages 442-443):

> "It is true that §3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on

the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited; and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem and a civil action*, while that to enforce the fine and imprisonment must be a criminal proceeding . . . Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by, the United States where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

The language in the *Coffey* opinion which Justice Frankfurter has termed "uncritical" [see his con-

curring opinion in *U. S. ex rel Marcus v. Hess* 317 U.S. 537, 554 (1943)], has been fruitful of litigation and has been challenged, narrowed, and distinguished in many cases.

At an early date, the Supreme Court began to delimit the scope of the *Coffey* case. Thus in *Stone v. United States*, 167 U.S. 178 (1897), affirming a decision of this Court (64 Fed. 667), the Supreme Court stated at pages 186-187:

> "We are of opinion that the present case is not covered by the decision in *Coffey v. United States*. The judgment in that case was placed distinctly upon the ground that the facts ascertained in the criminal case, as between the United States and the claimant, could not be 'again litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts.' In the *Coffey case* there was no claim of the United States to property, except as the result of forfeiture. In support of its conclusion, the court referred to *United States v. McKee*, 4 Dill. 128, observing that the decision in that case was put on the ground 'that the defendant could not be twice *punished* for the same crime, and that the former conviction and judgment was a bar to the suit *for the penalty*'." (Italics supplied by Court).

The *Stone* case therefore (1) enunciates the proposition that a person may not be twice punished for the same offense, and (2) declares the holding in the *Coffey* case to have been predicated upon "double jeopardy" rather than "res judicata." As will

be shown later in this brief, the distinction between "double jeopardy" and "res judicata" is significant here. Under what circumstances, however, can it be said that a civil suit against a defendant (who has been previously convicted or acquitted in a criminal prosecution) is an attempt to inflict a second punishment? Cases coming after the *Stone* case have wrestled with this problem and produced new refinements.

On February 24, 1931, the Supreme Court handed down two opinions which are pertinent here though neither or them cites the *Coffey* case. Both were civil actions brought by the Government against persons who had previously been *convicted* in criminal prosecutions charging them with violating the National Prohibition Act. In *United States v. La Franca,* 282 U. S. 568[3], the Government sought to collect taxes and penalties arising out of the same sales of intoxicating beverages that had been the basis of the defendant's conviction. After holding that the sums sought by the Government were penalties, the Court stated on page 573:

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[3] The language in this case as well as in *Coffey* case is termed "uncritical" by Justice Frankfurter in his concurring opinion in *U. S. ex rel Marcus v. Hess,* 317 U.S. 537, 554 (1943).

> "Respondent already had been convicted and punished in a criminal prosecution for the *identical transactions* set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?" (Italics added).

The Court gave its answer to this question on page 575:

> "But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action . . ."

In this case, therefore, the Court held that the prior conviction was a bar to the civil suit to recover a monetary penalty arising out of the identical transactions.

But in the companion case of *Various Items of Personal Property et al v. United States*, 282 U.S. 577, the Court held that a prior conviction for defrauding the Government of taxes on distilled spirits did *not* bar a civil action to *forfeit* the distillery and other property which the defendants had used in so defrauding the Government. On page 580, the Court stated:

> "In *United States v. La Franca, ante*, p. 568, we hold that, under §5 of the Willis-Campbell Act, a civil action to recover taxes, which in fact are penalties, is punitive in character and barred

by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding in rem to forfeit property used in committing an offense . . ." . . . The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing . . ." *The Palmyra* 12 Wheat. 1, 14 . . . (And) in *Dobbin's Distillery v. United States*, 96 U.S. 395 . . . the Court . . . said (p. 401):

" 'Nothing can be plainer in legal decision than the proposition that the offense therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.'

"To the same effect, see . . . *United States v. Five Boxes of Asafoetida*, 181 Fed. 561, 564 . . .

"A forfeiture proceeding under R. S. 3257 or 3281 is *in rem.* It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. *In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the the punishment for the criminal offense . . . The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply . . .*" (Italics supplied).

Let us now briefly consider the status of the *Coffey* case as of February 24, 1931 — the date of

the decisions in the *La Franca* case and the *Various Items of Personal Property Case.* As pointed out in the *Stone* case, the *Coffey* case rested upon the proposition that a person may not be punished twice for the same offense — which means he could not be put in jeopardy twice for the same offense. Under the *Coffey* case, therefore, a civil forfeiture proceeding based upon violation of the internal revenue laws was barred by the fact that the claimant had been *acquitted* in a prior criminal prosecution based upon the same offense, and that the forfeiture sought would be another punishment for the same offense. From this proposition and the reference in the Coffey opinion to *U. S. v. McKee* (at 116 U.S. 445), the inference is inescapable that a *conviction* in a prior criminal case would certainly bar a later forfeiture proceeding.

But on February 24, 1931, the Supreme Court split that inference. It held that a conviction in a prior criminal case would bar a later civil action to recover a *monetary* penalty. *(La Franca* case). But it also held that a conviction in a prior criminal case would not bar a later *in rem forfeiture* proceeding since "the forfeiture is no part of the punishment for the criminal offense" and since "the provision of the Fifth Amendment to the Constitution in re-

spect of double jeopardy does not apply." *(Various Items of Personal Property* case*)*.

The *Various Items of Personal Property* case is wholly inconsistent with the *Coffey* case. Upon facts on all fours with the *Coffey* case except that there had been a *conviction* in the prior criminal case, the Court held that the defense of double jeopardy could not properly be invoked and that the forfeiture was not a penalty for the criminal offense. We submit that on February 24, 1931, the Supreme Court came as close to overruling the *Coffey* case as it is possible to do *sub silentio.*

There remained the *La Franca* case as a vestigial residue of the *Coffey* case. The *La Franca* case, however, in its turn received the "distinguishing" treatment in *Helvering v. Mitchell*, 303 U.S. 391 (1938). This case is best considered in the light of the Court of Appeals decision it reversed, *Mitchell v. Commissioner of Internal Revenue*, 89 F. (2d) 873 (C.A. 2, 1937). There the Government sought judgment both for an income tax deficiency of $728,709.84 and for a 50% penalty for fraudulent tax evasion amounting to $364,354.92. The defendant had been acquitted in a prior criminal proceeding involving the same tax deficiency. Judge Augustus N. Hand, writing the opinion of the Court of Appeals, affirmed the judg-

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ment for the tax deficiency but not for the 50% penalty. His reasons, stated at 87 F. (2d) 878, were in part:

> "The . . . rule necessarily derivable from *Coffey v. United States* would seem to be that an acquittal in a criminal prosecution is a bar to a civil action to enforce fines or forfeitures of property which are in their nature criminal penalties. Though this rule seems hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility, it is implicit in the decision of *Coffey v. Unted States* which is binding on us in the absence of a modification by the Supreme Court."

Judge Hand also cited the *La Franca* case on page 878. One cannot but feel sympathetic with the Judge trying to steer between the judicially created Scylla and Charybdis.

Reversing the Court of Appeals insofar as it had not affirmed the judgment for the 50% penalty, the Supreme Court made the following rulings in charting the course:

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> "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata.* The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' . . . That acquittal on a criminal charge is not a bar

to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."

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"Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether §293(b) imposes a criminal sanction. That question is one of statutory construction."

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"Forfeiture of goods (etc.) . . . are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789."

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"That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guarantees governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guarantees do not apply."

In the significant final paragraph of its opinion, the Supreme Court stated (pages 405-406):

"Mitchell insists that *Coffey v. United States*, 116 U.S. 436, requires affirmance of the judgment; the Government argues that this case is

> distinguishable, and if not, that it should be disapproved. The *Circuit Court of Appeals, citing Stone v. United States*, 167 U.S. 178, 186-189, *and later cases, recognized that the rule of the Coffey case 'did not apply to a situation where there had been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof';* but construing §293(b) as imposing a penalty designed to punish fraudulent tax dodgers 'and not a mere preventive measure,' it thought that the *Coffey* case and *United States v. La Franca*, 282 U.S. 568, required it 'to treat the imposition of the penalty of 50 per cent as barred by the prior acquittal of Mitchell in the criminal action.' Since we construe §293(b) as imposing a civil administrative sanction, neither case presents an obstacle to the recovery of the $364,354.92, the 50 per centum addition here in issue." (Italics added).

Thus the Supreme Court in 1938 decided in the *Mitchell* case that the imposition of the 50% penalty was a *civil remedy* not barred by an acquittal in a prior criminal prosecution presenting the same factual issues. [To the same effect, see *U. S. v. National Association of Real Estate Boards*, 70 S. Ct. 711, 716 (1950).] Obviously, the Court did not accept the acquittal in the criminal case as *res judicata.* If the acquittal is a bar, it is only "because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. *Murphy v.*

United States, 272 U.S. 630, 632." (303 U.S. at page 398). But the constitutional guaranty against double jeopardy does not apply to a civil case (303 U.S. at page 402).

The *Murphy* case (272 U.S. 630) referred to in *Helvering v. Mitchell*, was a suit in equity to abate an alleged nuisance maintained in violation of the Prohibition Act. The defendants had been previously tried and acquitted in a criminal case that charged them with maintaining the same nuisance. It was the holding of the Supreme Court that the prior acquittal was not a bar to the decree of injunction entered by the lower court (page 632):

> "If we are right as to the purpose of §22 the decree in the present case did not impose a punishment for the crime from which the appellants were acquitted by the former judgment. That it did impose a punishment is the only ground on which the former judgment would be a bar. *For although the parties to the two cases are the same, the judgment in the criminal case does not make the issues in the present one res judicata*, as is sufficiently explained in *Stone v. United States*, 167 U.S. 178 and *Chantangco v. Abaroa*, 218 U.S. 476. *The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place.* Our answer to the question certified agrees with the conclusion of the Supreme Court of Kansas in a carefully considered case, *State v. Roach*, 83 Kan. 606." (Italics added).

From the *Murphy* case, it is clear that an acquittal in a criminal case can never be *res judicata* in a subsequent civil case, though such an acquittal may be invoked under the defense of *double jeopardy* to bar a later proceeding attempting to inflict a *punishment* for the same offense.

From the *Various Items of Personal Property* case, it is clear that the plea of *prior jeopardy* is not valid in an *in rem* forfeiture proceeding since such a proceeding does not inflict a punishment for a criminal offense.

From the case of *Helvering v. Mitchell*, it is difficult to see how any *in personam* civil suit to collect a monetary penalty could be barred by a judgment in a prior criminal case, either on the ground of *res judicata* or on the ground of *double jeopardy*.

We submit that the *Coffey* case has been distinguished to death though we call the Court's attention to the fact that it has not yet been properly laid to rest. In *United States v. National Association of Real Estate Boards*, 70 S. Ct. 711 (May 8, 1950), the Supreme Court reiterated the ruling of *Helvering v. Mitchell* that a judgment of acquittal in a criminal action is not *res judicata* in a later civil action. How-

ever, on page 716, footnote 6, the Court postponed interment of the *Coffey* case:

> "Since the Court (in Helvering v. Mitchell) ruled that the 50 per cent penalty was not a criminal penalty but a civil administrative sanction . . . the case was considered distinct from *Coffey v. United States* . . ., which held that the facts ascertained in a criminal case as between the United States and the claimant could not be again litigated between them in a civil suit which was punitive in character."

In view of the cases cited in this brief, we respectfully submit it will be difficult to conjure up a civil suit "punitive in character."

We think the case of *State v. Roach*, 83 Kan. 606, 112 Pac. 150 (1910) may be of interest to this Court in view of the words of praise written by Justice Holmes in *Murphy v. United States*, supra, 272 U.S. at page 633. In a clear yet respectful manner, the *Roach* case offers the most devastating criticism of the *Coffey* case that we have discovered in our research. Refusing to wink at the obvious flaw in the reasoning of the *Coffey* case, the Kansas Supreme Court stated (83 Kan. 609; 112 Pac. 151):

> "*The decision in the Coffey case seems to have been based rather upon the rule against a second jeopardy than upon the doctrine of res judicata*, the court apparently treating a civil action to recover a penalty for a violation of the law as in effect a criminal prosecution, although

the state courts have generally taken the other view . . ." (Italics added).

And at page 611 (112 Pac. 152), the Court uttered its keenest argument:

> "*The higher standard of proof* required of the plaintiff in a criminal action is so frequently mentioned in discussions of the doctrine of *res judicata* that its bearing on the subject may be said to be generally recognized. True, its mention is often associated with other matters that would alone be controlling. *But this difference between civil and criminal litigation is either without any significance at all in this connection or it is decisive*, and of itself prevents either party to an action from being concluded therein by a previous judgment obtained in a proceeding where the rule of evidence was less favorable to him. We think, upon principle and authority, an acquittal in a criminal case does not for all purposes amount to an adjudication against the state that the defendant did not commit the acts charged against him. *What a verdict of not guilty really decides is that the evidence does not exclude every reasonable doubt of the defendant's guilt.* If in the present case the injunction action had been tried first it would hardly be seriously contended that a judgment for the plaintiff would bar a defense in the criminal action. A sufficient reason why the defendant would not be concluded by the result in the civil case is that his guilt would not have been established beyond a reasonable doubt. *The consideration that protects him against the plea of res judicata in the one case deprives him of its benefits in the other.*" (Italics added.)

Again we would remind this Court that Justice

Holmes, writing the opinion of a unanimous Court in *Murphy v. United States*, *supra*, said:

> "Our answer to the question certified agrees with the conclusion of the Supreme Court of Kansas in a *carefully considered case*, *State v. Roach*, 83 Kan. 606." (Italics added).

We are, of course, not asking this Court to overrule the *Coffey* case. The foregoing argument was intended to summarize some of the highlights of the unhappy history of that case. In the remainder of our argument we will show how clearly the instant case falls outside the ambit of the *Coffey* case in the light of the intervening decisions.

At the outset, we wish to advise the Court that there have been two decisions adverse to the Government's position under the Federal Food and Drugs Act of 1906, though the instant case is the first of its kind under the Federal Food, Drug, and Cosmetic Act of 1938. *Stanley v. U. S.* 111 F. (2d) 898 (C.A. 6, 1940) was a case where the dismissal of an indictment *upon a demurrer* was held to be *res judicata* in a subsequent seizure action involving the same allegedly misbranded product. The opinion is extremely short, citing the *Coffey* case and several others. The second opinion, that of *U. S. v. 119 Packages . . . Z-G-Herbs*, 15 F. Supp. 327 (S.D. N.Y., 1936) is also short; it does not even cite the *Coffey* case. It might

be of interest that both the *Stanley* case and the *Z-G-Herbs* case involved the same product and were based upon the dismissal of the same criminal case. (N.J. 31107). We submit that these opinions are erroneous and do not explore the important question involved as fully as it merits.

Earlier in our argument, we showed that the instant case is a civil *in rem* proceeding under the Federal Food, Drug, and Cosmetic Act in which the Government's burden of proof is less than in criminal cases under the same Act. Actually, the statute provides three separate types of enforcement action—criminal, seizure, and injunction. (21 U.S.C. 333, 334 and 332). While the over-all purpose of the Act is to protect the consumer, the major emphasis in the criminal sanction is to punish for past violations. Thus, in House Report No. 2139, 75th Cong., 3d Sess., page 4 (April 14, 1938), the Committee on Interstate and Foreign Commerce stated with respect to this provision in the then pending bill:

> "Section 303 increases substantially the criminal penalties of the present law which some manufacturers have regarded as substantially a license fee for the conduct of an illegitimate business."

On the other hand, in the seizure and injunction remedies, the main emphasis is upon direct and

immediate protection of the public by apprehension of the violative article itself before it can do damage, and by enjoining further distribution of such article. Also in House Report No. 2139, *supra*, it is stated on page 4:

> "Since the seizure procedure is peculiarly adapted to the enforcement of a consumer-protective law in that it arrests the illegal goods before the consumer is harmed, your committee has been careful to avoid restricting this form of of action in cases where there is actual need for its exercise to protect health or prevent fraud."

It will further be observed that Section 304 (21 U.S.C. 334) fully and completely defines the conditions under which articles are liable to seizure and forfeiture. There is no reference to or dependence upon the criminal sanction provided for in Section 303 (21 U.S.C. 333). It is unimportant so far as the seizure proceeding is concerned whether or not any person is convicted under Section 303. Congress has defined fully in Section 304 when and under what circumstances the article shall be subject to seizure and forfeiture, without reference to the penalty that may be inflicted upon the shipper or anyone else under Section 303. On the other hand, it is provided in Section 305 (21 U.S.C. 335) that before any violation is reported to any United States Attorney for the institution of *criminal proceedings*,

the person against whom such proceeding is contemplated shall be given an opportunity to be heard. No such opportunity for a hearing is to be given prior to the *seizure* of the contraband article. The very purpose of Section 304 demands that a seizure of the article be made instantly upon the discovery of its contraband nature and before the article can be distributed in the channels of retail trade. Thus, it becomes clear that the purpose of a seizure action under Section 304 of the Act is protection of the consumer from an adulterated or misbranded product and not the infliction of a penalty or punishment against the shipper or owner.

If additional confirmation of this view is needed, it may be found within the statutory language. Section 304(a) authorizes seizure and condemnation of an adulterated or misbranded article. However, Section 304(d) [21 U.S.C. 334(d)] permits the owner of the condemned article to take such article down under bond in the discretion of the Court for the purpose of salvaging it by bringing it into compliance with law; the condition of the bond being that the article will not be disposed of contrary to law. Such a practice is very common in U. S. District Courts as can be readily seen by a random review of the Notices of Judgment. Of course, where an article is of such a nature that it cannot be brought into

compliance with law through relabeling or reprocessing, the owner will be denied the privilege of salvage. *Research Laboratories, Inc. v. United States*, 167 F. (2d) 410, 423 (C.A. 9, 1948), cert. denied 335 U. S. 843.

In a closely analagous situation, the Supreme Court has held that a statutory provision relieving an individual from the harshness of a detriment imposed by statute was a clear indication that such statute was not intended as a punishment. *Murphy v. United States, supra*, 272 U. S. 630 (1926). There the statute authorized the District Court to issue an injunction restraining defendants from occupying or using their premises *for one year* if it was found that intoxicating liquor had been unlawfully manufactured, sold, or stored there. However, the statute made it discretionary with the Court to permit occupany of the premises upon the posting of a bond conditioned that intoxicating liquor would not be sold, kept, etc., on the premises. The defendants had been acquitted in a criminal case involving the same nuisance and they argued they could not be punished in a second proceeding. On pages 631-632, the Court rejected their contention and held that the equity proceeding did not inflict a punishment:

> "It is true, especially if the premises are closed for a year, that a pecuniary detriment is

> inflicted, but that is true of a tax, and sometimes it is hard to say how a given detriment imposed by law shall be regarded . . . The mere fact that it is imposed in consequence of a crime is not conclusive . . . *(A government) may provide for the abatement of a nuisance whether or not the owners of it have been guilty of a crime.* The only question is what the twenty-second section is intended to accomplish. It appears to us that the purpose is prevention, not a second punishment that could not be inflicted after acquittal from the first. This seems to us to be shown by the whole scope of the section as well as by the unreasonableness of interpreting it as intended to accomplish a plainly unconstitutional result. The imperative words go only to the immediate stopping of what is clearly a nuisance. *The permissive words allow closing for a year (a not unreasonable time to secure a stoppage of the unlawful use . . .) and show the purpose of that by providing the alternative of a bond conditioned against such uses.*"
> (Italics added).

On the basis of this case alone we submit that it would be unreasonable to hold that the seizure provisions of the Act here involved are punitive,[4] since they specifically authorize return of the goods under seizure to the owner on condition that he bring them into

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[4] See also *U. S. ex rel Marcus v. Hess*, 317 U.S. 537 (1943) where the Court said on page 551:

> "It is true that 'Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute . . ."

compliance with the law. In other words, in order to reacquire full possession of this property, the owner is required to do only what he should have done in the first place; this can hardly be deemed a punishment.

Earlier in this brief, we cited *Various Items of Personal Property v. U. S.*, 282 U.S. 577 (1931) where the Supreme Court held that an *in rem* forfeiture proceeding is independent of the personal responsibility of the owner. Among the cases cited by the Court (on page 581) as being "to the same effect" is *U. S. v. Five Boxes of Asafoetida*, 181 Fed. 561, 564, (E.D. Pa., 1910) a case that arose under the Federal Food and Drugs Act of 1906. In the *Asafoetida* case, the District Court had said at the page cited:

> "The misdemeanor denounced in section 2 is entirely distinct and independent of the grounds of forfeiture in section 10."

The Supreme Court might also have cited its own opinion regarding the independence of the seizure and criminal provisions of the Federal Food and Drugs Act of 1906—e.g., *Hipolite Egg Co. v. U. S.*, 220 U.S. 45 (1911). There the Court had said on page 55:

> "It is certainly to the interest of a producer or consumer that the article which he receives

> . . . shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. *There is nothing inconsistent in the remedies, nor are they dependent.*"
> (Italics added).

Perhaps one final argument will suffice to show the absurd result which must follow if the *Coffey* case is deemed to govern here. As we have demonstrated, the *Coffey* case was based upon the theory of "double jeopardy", not upon the theory of "res judicata". While the opinion in the *Coffey* case may be somewhat ambiguous on this point, subsequent decisions of the Supreme Court have eliminated all uncertainty. It is now clear that the Court's efforts are intended to avoid subjecting a person to double punishment for the same offense. If the *Coffey* case bars a seizure action after *acquittal* in a prior criminal case, then it must *a fortiori* bar a seizure action after a *conviction* in a prior criminal case. Consequently, if a defendant is once *convicted* of violating the Federal Food, Drug, and Cosmetic Act, the Government would be barred from thereafter seizing the misbranded or adulterated article which was involved in the criminal case, since such seizure would then constitute a second punishment.

In the *Coffey* case and in all the decisions of the courts heretofore discussed in this brief in which

the rule in the *Coffey* case is brought into play, with the possible exception of *Stanley v. United States*, 111 F. (2d) 898, the same transaction was involved in the criminal case and in the related civil case—e.g., the prosecution, verdict, and judgment were based upon the identical facts that were involved in the subsequent suit for penalty or forfeiture. The question presented in each was whether the civil proceeding to enforce the penalty or forfeiture was barred by the prior conviction or acquitted in a criminal case based on the *very transaction* relied upon in the civil proceeding. The shipment of Sulgly-Minol which was the basis of the criminal case in the District of Minnesota where Gramer was acquitted was made *on April 16, 1948*. The shipments involved in the instant seizure actions were made *on October 15, October 17, and November 22, 1949*. (R. 4, 7, 11, 14). It is the introduction into interstate commerce of the misbranded article which constitutes the offense under 21 U.S.C. 331. Since each shipment thus constitutes a separate offense and since the shipment involved in the Minnesota case was separate and distinct from the shipments involved here, we submit it is not possible to conceive that this consolidated seizure case in any way constitutes an attempt to inflict a second punishment upon the appellee for the

same offense that was involved in the criminal case in the District of Minnesota.

Moreover, if seizure actions are penalties within the "jeopardy" provision of the Fifth Amendment, then multiple seizures such as are authorized by Section 304(a) of the Act [21 U.S.C. 334(a)] would be invalid. Yet in *Ewing v. Mytinger & Casselberry, Inc.*, 70 S. Ct. 870 (1950), the Supreme Court recently sustained the constitutionality of the multiple seizure provision of the statute under the Fifth Amendment. The Court's opinion deals with the "due process" clause and does not even mention the "jeopardy" clause.

In summation, we submit that the *Coffey* case is an interesting judicial phenomenon without relevance here. An acquittal in a criminal case is not *res judicata* in a subsequent *in rem* seizure action under the Federal Food, Drug, and Cosmetic Act because of the difference in burden of proof. A seizure action is not a punishment for a criminal offense and therefore may not be barred under a *double jeopardy* plea based upon an acquittal in an earlier criminal case.

VII

CONCLUSION

We submit that the District Court erred in failing to grant the Government's Motion to Strike, and erred in granting the Claimant's Motion for Summary Judgment. We respectfully ask this Court to reverse the decisions of the Lower Court accordingly.

Respectfully submitted,

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